79-644

IN THE

Supreme Court of the United States

October Term, 1979

No. A-138

ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES and ARCT, INCORPORATED,

Petitioners,

v.

THE DUPLAN CORPORATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners Ateliers Roannais de Constructions Textiles ("ARCT-France") and ARCT, Inc., respectively, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 26, 1979, affirming in part and reversing in part the judgment of the District Court for the District of South Carolina, Spartanburg Division.

Opinions Below

The two page *per curiam* opinion of the Court of Appeals dated March 26, 1979, reported as *Duplan Corp. et al. v. Deering Milliken, Inc. et al.*, 594 F.2d 979, is reproduced in the Appendix hereto at A413 to A418.* The 123 page opinion of the District Court, dated July 29, 1977, reported at 444 F.Supp. 648, is reproduced at A1 to A279.

Jurisdiction

The opinion and judgment of the Court of Appeals was entered on March 26, 1979. A timely petition for rehearing was denied on May 29, 1979 and this petition for writ of certiorari is filed prior to October 22, 1979, the date to which petitioners' time for filing was extended by this Court's Order of September 21, 1979. This Court has jurisdiction to review the opinion and judgment of the Court of Appeals by writ of certiorari under Title 28 U.S.C. §1254.

Question Presented**

Under Rule 52(a) of the Federal Rules of Civil Procedure, may the Court of Appeals ignore findings of fact

* All parties before the Court of Appeals in this proceeding are filing petitions for writ of certiorari and the references herein are to pages of the Joint Appendix filed concurrently herewith on behalf of such parties.

** The questions presented in the petition for writ of certiorari filed concurrently herewith by petitioners' co-defendants Deering Milliken, Inc. (DMI), Deering Milliken Research Corporation (DMRC) and Moulinage et Retorderie de Chavanoz (Chavanoz) are also applicable here and petitioners refer to such co-defendants' petition for discussion of such questions.

made by the District Court and the substantial evidence on which such findings are based and, without determining that such findings are clearly erroneous or without concluding upon the entire evidence that a mistake has been committed, make findings *de novo* which are in direct conflict with the trial court findings?

Statutory Provision Involved

This case involves the construction and application of Rule 52(a) of the Federal Rules of Civil Procedure which is as follows:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Statement of the Case

The Proceedings Below

This petition is from the decision of the Court of Appeals for the Fourth Circuit (A413 to A418) affirming in part and reversing in part the judgment of the District Court for the District of South Carolina, Spartanburg Division.

After 91 trial days, the District Court, sitting without a jury, held that the petitioners did not have knowledge of and did not participate in a horizontal combination and conspiracy which was found to exist between the other defendants and the Leesona Corporation ("Leesona").

Although lauding the District Court's opinion as "admirably comprehensive in its detail of the facts and its discussion of the proof" (A416) and noting also that the inferences drawn by the District Court "are warranted and fair" (A416), the Court of Appeals, in a short *per curiam* decision, proceeded to reverse the judgment of the District Court in favor of petitioners, supporting such reversal on new findings to the effect that petitioners had knowingly participated in the horizontal conspiracy by reason of knowledge imputed to them in respect to an agreement settling litigation.

The Parties

Petitioner ARCT-France is a French textile machinery manufacturer which made and sold the so-called FT machines involved in the proceedings below.* Petitioner

* The function of the FT machine is to impart a permanent crimp to synthetic thermoplastic yarns by a method known as "false twist" which involves a continuous process wherein the yarn is twisted, heated in its twisted state, cooled and then untwisted. A number of features of the FT machine were covered by patents owned and licensed by co-defendant Chavanoz.

ARCT, Inc., a North Carolina corporation and a subsidiary of ARCT-France, is the United States distributor of textile machines manufactured by ARCT-France. Henri Crouzet, a citizen and resident of France, was, at all times involved, the President of both petitioners, and Robert F. Waters, a United States citizen, was Vice President and General Manager of ARCT, Inc.

Since 1954, petitioner ARCT-France has manufactured and sold the FT machines under a patent license granted by co-defendant Chavanoz. This license was limited and excluded the right to use the machines under the Chavanoz patents. The reserved use rights for the United States were separately licensed by Chavanoz to co-defendant DMRC. Under the terms of its license from Chavanoz, ARCT-France was obligated to sell its machines in the United States only to concerns holding a use license from DMRC* and such concerns included all of the respondents herein.**

From 1959 until the formation of petitioner ARCT, Inc. in 1966, the United States distributor of ARCT-France

* This restriction, which was attacked by respondents (the plaintiffs below) as an unlawful vertical restraint, was upheld by the District Court below and by the Court of Appeals. A similar restriction was also held valid by the Court of Appeals for the Fifth Circuit in *In re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127 (5th Cir. 1976).

** Respondents purchased FT machines from Whitin and ARCT, Inc. and used such machines under royalty-bearing licenses granted by DMRC. Respondents are the following companies: The Duplan Corporation, Burlington Industries, Inc., Dixie Yarns, Inc., Frank Ix & Sons Virginia Corp., Hemmerich Industries, Inc., Jonathan Logan, Inc., Leon-Ferenbach, Inc., National Spinning Company, Inc., Olympia Industries, Inc., Reliable Silk Dyeing Co., Inc., Schwarzenbach-Huber Co., Spring-Tex, Inc., Texelastic Corporation, Texfi Industries, Inc. and United Merchants & Manufacturers, Inc.

was Whitin Machine Works of Whitinsville, Massachusetts ("Whitin") and Robert F. Waters, then an employee of Whitin, was in charge of the sales of FT machines. Although not a party in the proceedings below, Whitin was named as a co-conspirator by respondents.

Leesona, having its principal place of business near Providence, Rhode Island, manufactured and sold similar textile machinery in the United States and abroad in competition with ARCT-France. Such machinery was sold by Leesona on condition that each purchaser accept a royalty-bearing use license under Leesona's patents. Leesona was also found by the District Court to be a co-conspirator with defendants Chavanoz, DMRC and DMI (A263-4).

The Leesona Litigation

In and after 1959 two separate and distinct licensing programs existed under patents relating to false twist machinery. In one program Leesona licensed the use of machinery manufactured by it, and later, machinery manufactured by parties other than ARCT-France as well.* The other was the program of DMRC which licensed the use of FT machines manufactured by ARCT-France.

Following delivery and installation of one of the first FT machines imported into the United States, Leesona instituted a patent infringement action against the purchaser, a licensee of DMRC under the Chavanoz patents, and DMRC promptly came to the defense of its licensee. Thus, from the very beginning of the marketing of ARCT-France's machines in the United States, the two competing

* See *In re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127 (5th Cir. 1976).

patent licensors, DMRC and Leesona, were locked in a struggle to determine the infringement and validity of Leesona's United States patents.

The Leesona Settlement

At various times during the pendency of the Leesona litigation there were settlement discussions with Leesona, but it was not until early in 1964 that the parties were able to come to an agreement.

The settlement was evidenced by agreement dated as of March 31, 1964 (A56). The formal documents involved in the settlement were signed on behalf of ARCT-France by Leo Soep as attorney in fact. At that time, Leo Soep, a French patent agent ("conseil en brevets"), was a full time employee of an affiliate of Chavanoz and was the Chavanoz representative at the settlement.*

Reasons for Granting the Writ

This petition presents an instance of complete disregard of the mandate of Rule 52(a), Federal Rules of Civil Procedure,** and emphasizes the need for judicial clarification of the mandate of such Rule.

The Court of Appeals substituted its judgment for that of the District Court by making *de novo* findings on

* The District Court expressly found that in representing both Chavanoz and ARCT-France, Soep was involved in a conflict of interest situation and held Soep's knowledge was not imputable to ARCT-France (A80).

** Rule 52(a) provides in part: ". . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

crucial issues. It then relied upon these findings to reverse the trial court which had made diametrically opposite findings on the same issues to support its decision exonerating petitioners as participants in the horizontal antitrust conspiracy. This "setting aside" of the findings of fact of the District Court was done without determination that the conflicting findings were "clearly erroneous" or that upon the entire evidence a mistake had been committed.

Both the District Court and the Court of Appeals concede, as they must, that knowledge of the conspiratorial purpose and effect of the 1964 Leesona settlement agreement is an essential element to a finding of participation in the horizontal conspiracy (A80-1, A417). Attributing such culpable knowledge to petitioners was the crux of the decision of the Court of Appeals. On this factual issue the appellate court is in direct and irreconcilable conflict with the express findings of fact made by the trial court.

Scope of the Petition

This petition will (1) demonstrate the need for a clarification by this Court to eliminate the existing confusion and diversity in respect of the scope and application of Rule 52(a), Federal Rules of Civil Procedure, and (2) illustrate wherein the *per curiam* opinion of the Court of Appeals is in direct conflict with detailed findings of fact made by the District Court.

The Need for Clarification

It is submitted that the action taken by the Court of Appeals in this proceeding is the inevitable result of the

confusion and diversity presently existing among the circuits respecting the deference to be paid to the trier of the facts.

The *Gypsum* and *Zenith* Decisions

In 1948 this Court, in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), held:

> ". . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*id.* at p. 395).

The definition pronounced in *Gypsum* did not result in uniform application of Rule 52(a) but, on the contrary, seemed to encourage the circuit courts to make new findings upon a subjective determination that a mistake had been made. Accordingly, ten years later this Court again addressed itself to this question, saying:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo* . . . The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)." (*Zenith Radio Corp.* v. *Hazeltine Research, Inc. et al.*, 395 U.S. 100, 123 (1969).

Zenith, however, has failed to evoke any degree of uniformity and at least two inconsistent rules are followed

in determining whether or not the trial court's findings are to be set aside as "clearly erroneous."

The Conflicting Viewpoints

In a number of circuits the rule applied is that findings supported by substantial evidence will not be set aside even though the appellate court would have made different findings on the same evidence.* In other circuits, however, the appellate court would make its own findings, despite the presence of substantial evidence supporting the trial court's findings, if the reviewing court is left with the definite and firm conviction that a mistake has been committed.**

The two conflicting rules have been concisely stated as follows:

> "It is fundamental and without dispute in the law that an appellate court will not set aside the judgment of a trial court, based upon findings of fact, unless there is in its judgment no substantial evidence in the record supporting the court's findings. . . ." (*Onego Corporation* v. *United States,* 295 F.2d 461, 463 (C.A. 10th 1961)).
>
> "We recognize that we are not bound by the factual determinations of the district court merely because

* The "substantial evidence" rule presents an objective standard for determining whether or not the trial court's findings are "clearly erroneous". Such rule has also been followed by this Court. As stated in *McAllister* v. *United States,* 348 U.S. 19 (1954) ". . . We cannot say in review that a judgment based upon such [substantial] evidence is clearly erroneous" (*id.* p. 22).

** As demonstrated by the decision of the Court of Appeals in this proceeding, this rule permits the appellate court to assume a major fact finding function in spite of the clearly contrary intent of Rule 52(a) and the pronouncements of this Court.

> they are supported by substantial evidence, and that a finding may be rejected as 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (*Jones* v. *Pitt County Board of Education,* 528 F.2d 414, 418 (4th Cir. 1975)).

A brief review of the current situation demonstrates the lack of uniformity among the appellate courts in applying Rule 52(a) to the factual findings of the trial court.

In the First Circuit the rule presently is that ". . . the test is not whether there can be found 'substantial evidence' supporting the conclusion . . . Rather, the question is whether, on the record as a whole, the appellate court views the conclusion as clearly erroneous . . ." (*Burgess* v. *M/V Tamano,* 564 F.2d 964, 976 (1st Cir. 1977), *cert. den.* 435 U.S. 941 (1978)).*

The Second Circuit appears to straddle both viewpoints, holding that findings supported by substantial evidence will not be disturbed (*Kennedy Park Homes Association, Inc.* v. *City of Lackawanna, New York,* 436 F.2d 108, 112 (2nd Cir. 1970), *cert. den.* 401 U.S. 1010 (1971)) unless "clearly erroneous" (*Pampillonia* v. *Concord Line, A/S,* 536 F.2d 476, 477, note 2 (2nd Cir. 1976)).

The Court of Appeals for the Third Circuit has steadfastly upheld the trial court's findings if they are supported by substantial evidence. In somewhat more precise language than is usually found, that court has said:

* But compare with *Evans* v. *United States,* 319 F.2d 751 (1st Cir. 1963) where the Court stated: "It is settled that an appellate court has no power to disturb a finding of fact of a trial court where it is based on some substantial though conflicting evidence" (*id.* p. 753).

". . . It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the facts found by the trial court. To hold otherwise would be to permit a substitution by the reviewing court of its finding for that of the trial court, and there is no existing authority for this in the federal judicial system . . ." (*Krasnov et al* v. *Dinan*, 465 F.2d 1298, 1302-03 (3rd Cir. 1972))*

The present practice in the Fourth Circuit, if the decision below is considered, would seem to be a total disregard for Rule 52(a) because there the appellate court made new findings completely inconsistent with the findings of the trial court, without regard to the entire evidence and without determining whether and to what extent the trial court's findings were "clearly erroneous" on the basis of the evidence. Prior to this decision, the Fourth Circuit generally followed the rule of the First Circuit that findings based upon substantial evidence may nevertheless be set aside if considered "clearly erroneous" (*Jones* v. *Pitt County Board of Education*, 528 F.2d 414, 418 (4th Cir. 1975)).**

* See *Reading Company* v. *Dredge Delaware Valley*, 468 F.2d 1161 (3rd Cir. 1972), where the court said: "We have carefully reviewed the record and are satisfied that the findings of fact . . . are supported by substantial evidence." (*id.* p. 1164).

** In *Glasscock* v. *United States*, 323 F.2d 589, 591 (4th Cir. 1963), the Fourth Circuit appeared to follow the rule that findings based upon substantial evidence will not be set aside, but in *Jones* v.

(footnote continued on next page)

In the Fifth and Sixth Circuits and in the District of Columbia, the appellate courts apparently will not hesitate to set aside the findings of the trial court supported by substantial evidence if in their view an error has been committed (*Tittle* v. *Aldacosta*, 544 F.2d 752, 754 (5th Cir. 1977); *Gowdy* v. *United States*, 412 F.2d 525, 532-533 (6th Cir. 1969), *cert. den.* 396 U.S. 960 (1969), *reh. den.* 396 U.S. 1063 (1970); *Daniels* v. *Hadley Memorial Hospital*, 566 F.2d 749, 756-757 (CA D.C. 1977)).

In contrast, the appellate courts in the Seventh, Eighth, Ninth and Tenth Circuits adhere to the principle that findings of fact are not to be considered "clearly erroneous" if there is substantial evidence to support them (*United States* v. *City of Chicago*, 549 F.2d 415, 429-430 (C.A. 7th 1977), *cert. den.* 434 U.S. 875 (1977); *United States* v. *City of Bellevue, Nebraska*, 474 F.2d 473, 475 (8th Cir. 1973), *cert. den.* 414 U.S. 827 (1973); *Purer & Co.* v. *Aktiebolaget Addo*, 410 F.2d 871, 878 (9th Cir. 1969), *cert. den.* 396 U.S. 834 (1969);* *West American Insurance Co.* v. *Allstate Insurance Co.*, 295 F.2d 513, 515 (10th Cir. 1961).

The need for a uniform application of Rule 52(a) is obviously in the interest of the orderly administration of justice. The success or failure of a litigant should not depend upon the policy of a particular circuit with respect to the deference to be paid to the factual findings of the trial court.

Pitt County Board of Education, supra, this rule was clearly abandoned. The Court said: "Several circuits subscribe to the proposition that a finding that is supported by substantial evidence cannot be clearly erroneous. . . . we think the prevailing rule in this circuit is to the contrary." (*id.* at 418, note 9).

* But see *N.L.R.B.* v. *Sequoia District Council of Carpenters*, 568 F.2d 628, 631 (9th Cir. 1977).

The Direct Conflict Between the Respective Findings of the Courts Below

The District Court found that the 1964 Settlement Agreement was not unlawful *per se*, characterizing it as follows:

> ". . . While on its face the agreement would not seem to offend the antitrust laws, when considered in the light of the surrounding circumstances and the actions of the parties* both before and after its execution, the conclusion is that the agreement was anti-competitive and a restraint on interstate commerce in violation of Section 1 of the Sherman Act . . . ." (A66-7)

Although not making a separate finding in this regard, the Court of Appeals substantially overstated the District Court's finding:

> "The District Court found that the 1964 Settlement Agreement was the core of a scheme to stabilize and maintain production royalties on false-twist machines and to monopolize the U.S. market for these machines." (A417)

On the basis of substantial evidence, the District Court expressly found that the petitioners had no knowledge of any anticompetitive effect of the settlement and that the only reason settlement was desired by ARCT-France was to secure freedom to manufacture and sell FT machines and to remove the uncertainty and financial risk of a lawsuit (A79-81, A387, A396).

Notwithstanding the detailed findings by the District Court exculpating petitioners from wrongdoing, the Court

* "The parties" referred to by the District Court did not include either of the petitioners.

of Appeals undertook to fix petitioners with knowledge of the "anti-competitive" nature of the agreement, disregarding the substantial evidence which the trial court had considered.

For example, the Court of Appeals had before it the following finding from Judge Dupree's opinion:

> "The fact that ARCT-France was actually a party to the Leesona Settlement Agreements is regarded as having little probative force. It was not a party to the United States litigation but was, of course, involved in litigation in France which the settlement encompassed. It was represented here by Leo Soep, the ubiquitous 'conseil en brevets,' who signed the agreement for ARCT-France as attorney-in-fact. Soep also signed for Chavanoz for whom he had been the chief negotiator. There is no evidence that Henri Crouzet, ARCT-France's president and chief executive officer, had any part in the negotiations. His limited skill in English makes it unlikely that he had sufficient understanding of the proceedings in the United States to form any intent concerning a conspiracy." (A80)*

Notwithstanding such finding, the Court of Appeals imputed culpable knowledge to ARCT-France on the basis of the following:

> "ARCT-France participated in the settlement negotiations through a representative, signed the final agreement . . . ." (A417)

Again, disregard of the mandate of Rule 52(a) is shown when the Court of Appeals attached culpable sig-

* See Finding of Fact No. 48 (A395-6) which details the basis for this statement.

nificance to the "at least peripheral participation" (A417) by Robert F. Waters in the settlement negotiations.* Reliance upon this "participation" to impute knowledge to petitioners is unjustified in view of the evidence respecting Waters' contact with the 1964 settlement. On the basis of the evidence, the trial court found:

> "22. Waters was in charge of the false-twist machinery sales for Whitin but was not a part of the management, and although he attended two meetings at which unproductive settlement negotiation discussions occurred, there is no evidence that he had any part in the final negotiations which resulted in settlement or that he understood the anti-competitive import of the agreements finally reached. Thus, it cannot be said that he brought with him to ARCT, Inc. any guilty knowledge of the conspiracy. See *United States* v. *Wilshire Oil Company of Texas*, 427 F.2d 969 (10th Cir. 1970)." (A79)**

The Court of Appeals further disregarded the findings of the trial judge when it attempted to attach culpable knowledge and intent to petitioners through the "ubiquitous" Leo Soep.† The appellate court apparently conceived of Soep as a conduit through whom guilty knowledge of the purpose and intent of the 1964 settlement could be attributed to petitioners. As a "conseil en brevets," his allegiance for years had been to Chavanoz. He was chief negotiator for the Chavanoz interest which was to preserve

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* Waters testified extensively at the trial and the District Court even found that he did not see a copy of the agreement until deposed in this litigation in 1970 (A389).

** This portion of Judge Dupree's opinion was predicated upon his exhaustive Finding of Fact No. 43 (A388-9).

† The Court referred to Soep as the ARCT-France representative (A417).

the royalty program. This, of course, included the continued sale of ARCT machinery in the United States in order to have machinery in the field to be licensed by Chavanoz and DMRC. The trial court portrayed Soep's role in the following manner:

> "Moreover, Soep's guilty knowledge and intent, if any, were not necessarily imputable to ARCT-France, for his primary allegiance for years had been to Chavanoz and in this instance he was in a conflict of interest situation. Chavanoz's sole interest in the settlement was to preserve the production royalty program. On the other hand, ARCT-France's sole interest was in selling machines, an endeavor for which the DMRC-Chavanoz licensing program posed a constant impediment." (A80)

The complete disregard of the mandate of Rule 52(a), Federal Rules of Civil Procedure, appears in the sweeping assertion which prefaces the *"per curiam"* opinion of the Court of Appeals:

> ". . . The evidence is clear and conclusive that these defendants [petitioners] were active, knowing participants in the horizontal conspiracy." (A416)

This indictment by the Court of Appeals cannot be reconciled with the factual findings of Judge Dupree, who, after the ninety-one day trial, concluded from the evidence as follows:

> "The conclusion is that the requisite intent to violate the antitrust laws on the part of ARCT-France in entering into the Leesona settlement agreement and its actions subsequent thereto have not been made to appear by a preponderance of the evidence. . . . Similarly, proof is lacking that ARCT, Inc. knew of

the existence of the conspiracy and consciously committed itself to the common scheme with intent to pursue its objectives. . . .'"* (A80-1)

Participation in the "Scheme"

Lastly, the Court of Appeals undertook to impute to petitioners knowledge of the conspiracy by finding that in order for the horizontal conspiracy to be successful, petitioners' cooperation was essential.** This boot strap reasoning assumes that petitioners were aware of the existence of the alleged "scheme," an awareness which the trial judge expressly found did not exist (A79-81, A396). The record is devoid of evidence that ARCT-France or ARCT, Inc. were ever privy to any understanding respecting the stabilization of competitive production royalties.† Furthermore, the restriction on deliveries of FT machines to DMRC's use licensees is no evidence of petitioners' knowledge or participation since such restriction was a condition in the manufacturing license received by ARCT-France from Chavanoz and had been in effect and observed for more than four years prior to the 1964 Settlement Agreement.

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* It should be noted that Judge Dupree, in making this finding, followed the law as set forth by this Court in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al.,* 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954) (A63, A81), which the Court of Appeals appears to have completely overlooked.

** The Court of Appeals stated: "Both ARCT-France and ARCT, Inc. knew that their co-operation was essential to successful operation of the scheme, and they gave that co-operation . . ." (A417-8).

† Moreover, production royalties were not petitioners' concern since, as the District Court found, petitioners never received any part of them (A79-80, A405). The trial court's refusal to infer that petitioners knew of and participated in the horizontal conspiracy in view of the fact that no benefits from such conspiracy were to be obtained by them is squarely supported by *First National Bank* v. *Cities Service,* 391 U.S. 253, 285-288 (1968).

The flagrant disregard by the Court of Appeals of the mandate of Rule 52(a) and the findings specifically made by the trial judge and painstakingly incorporated in his "thorough, explicit and sound" opinion (A416) serves to emphasize the need for this Court to exercise its power of supervision and provide a definitive guideline for appellate courts so that Rule 52(a) will be given meaningful and uniform application.

Conclusion

For the foregoing reasons, petitioners pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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